IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 13, 2007

STATE OF TENNESSEE v. MARK C. NOLES

Appeal from the Circuit Court for Rutherford County
No. F-53133C James K. Clayton, Jr., Judge

No. M2006-01534-CCA-R3-CD - Filed November 6, 2007

The appellant, Mark C. Noles, was convicted by a jury of attempted aggravated arson and sentenced to seventeen years as a Range II multiple offender. On appeal, the appellant challenges the sufficiency of the evidence, the trial court's instruction to the jury regarding accomplice testimony and whether the trial court denied the appellant his right to allocution at the sentencing hearing. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court are Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID G. HAYES, and J. C. MCLIN, JJ., joined.

David O. Haley, Murfreesboro, Tennessee, for appellant, Mark C. Noles.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Bill Whitesell, District Attorney General; and Trevor H. Lynch, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

In October of 2002, the appellant was indicted by the Rutherford County Grand Jury for the August 12, 2002, aggravated arson of a triplex apartment building in Murfreesboro. A jury trial commenced on July 20, 2004.

At trial, there were multiple accounts of the events leading up to the fire. The jury heard testimony from Malinda Ann Stacey, one of the occupants of the triplex apartment building on East Northfield Boulevard in Murfreesboro. Ms. Stacey's apartment was located on the second story of

the building and was accessible by an interior staircase in the center of the building. At the time of the fire, Ms. Stacey testified that she was involved in a personal relationship with Jason Walz. Ms. Stacey testified that she had known the appellant for quite sometime, but had not spent a lot of time around the appellant until he started dating Jodi Wilkinson. Ms. Stacey testified that in the days preceding the fire, Kelly Rose, Jodi Wilkinson, Hope Dennis and Ms. Dennis' boyfriend Paul Fetty stayed at her apartment. The appellant's pit bull dog was also staying at the apartment. The dog was sick, often throwing up blood and having blood in its bowel movements. Ms. Stacey told the appellant that he needed to take the dog somewhere else.

On August 12, 2002, Ms. Stacey witnessed her downstairs neighbor, David, give seventy-five dollars to the appellant for the purpose of buying cocaine. The appellant took the money, but never gave David any drugs. According to Ms. Stacey, she, Hope Dennis, and Ms. Wilkinson shaved the appellant's dog in retaliation. After shaving the dog, Ms. Dennis wrote, "You're next, bitch" on the dog with a black magic marker.

Ms. Stacey then received a threatening telephone call from an acquaintance named Amanda Howard. According to Ms. Stacey, problems arose between Ms. Stacey and Ms. Howard after Ms. Stacey and Mr. Walz got into an argument and Ms. Stacey told Mr. Walz that she no longer wanted to see him. Several other women made threatening telephone calls to Ms. Stacey that day, including Laura Hedgepath.

Ms. Stacey stated that later that day, the appellant arrived at her apartment with "a bunch of people," including Jimmy McCrary, Shannon Hines, Christa Tellas and other people that she did not know. Ms. Stacey was not sure if Mr. Walz was among the people that came to her apartment that day. In total, Ms. Stacey estimated that ten or twelve people came inside her apartment. The appellant told Ms. Stacey that the "bitches are here." Ms. Stacey took the appellant to mean that the "girls was [sic] there ready to fight." The appellant and the other people stayed at Ms. Stacey's apartment for approximately twenty minutes. No physical altercation occurred at that time, but Ms. Stacey heard one of the people in the group say, "We'll just come back and burn her MF'ing house down." The group then left the apartment together.

Sometime later, Ms. Stacey and Ms. Wilkinson left the apartment to take someone home. Ms. Rose also left the apartment at that time. Hope Dennis and her boyfriend Paul Fetty stayed at Ms. Stacey's apartment. When Ms. Stacey returned, it was dark outside and her building was surrounded by "blue lights and ambulances, police cars, [and] fire trucks." A police officer informed her that someone had burned her apartment.

The apartment received "very bad" smoke damage and, according to Ms. Stacey, the entire apartment was "a mess." The smoke ruined her clothing and television and her son's bicycle was "melted." Sometime after the fire, Ms. Stacey received a telephone call from the appellant in which he denied setting fire to her apartment.

Amanda Howard offered her account of the events leading up to the fire. She testified that on August 12, 2002, the appellant, Ms. Whitaker, Ms. Hedgepath, Mr. Anderson and Mr. Walz came to her house and called Ms. Stacey on the telephone. She overheard the appellant saying something "about a dog." After the appellant got off the phone, she, the appellant, Ms. Hedgepath, Ms. Whitaker and Mr. Walz went to Ms. Stacey's apartment to get the appellant's dog. According to Ms. Howard, there was no altercation. They merely picked up the dog and returned to her trailer.

The appellant later called Ms. Stacey again and said "something that they were going to fight." Ms. Howard, Mr. Walz, Ms. Whitaker, Ms. Hedgepath, Mr. Anderson and Amy Robinson went back to Ms. Stacey's apartment at that time. The appellant, Shannon Hines, Jimmy McCrary and Christa Tellas were at Ms. Stacey's apartment as well. When they arrived, only Ms. Dennis and Mr. Fetty were inside the apartment. There was some shouting between Ms. Dennis and Mr. Fetty and the large group. Eventually, the large group of people returned to Ms. Howard's trailer.

Ms. Howard then stated that the appellant, Mr. Walz and Ms. Whitaker went into her bedroom and talked for fifteen to twenty minutes. Then, according to Ms. Howard, the entire group left in two separate cars and went to a gas station to get gas. After leaving the gas station, the two groups again headed to Ms. Stacey's apartment. Ms. Howard claimed that when she drove past the apartment, it was on fire and fire trucks were already present. Ms. Howard drove back to her trailer and the appellant, Mr. Anderson, Mr. Walz and Eric Taylor were already there. Mr. Taylor had burns on his face and Mr. Anderson was applying cold rags to the wounds. Ms. Howard stated that the appellant and Mr. Walz were sitting on the couch talking about the fire at Ms. Stacey's apartment, acting "like it was fun and jokes." Ms. Howard heard the appellant say that "[h]e threw the bottle and hit Eric with it. That's why he got burned." Ms. Howard also heard the appellant say that "they ran up the stairs and started throwing stuff in the house." The appellant threatened the group, telling them that he would hurt them if they said anything to the fire department or police. Sometime later, Mr. Taylor was taken to the hospital for treatment.

A few days later, Ms. Howard was approached by the authorities. At first, she told police she did not know anything about the fire because she was "scared" that the appellant would kill her. About a week later, Inspector Carl Peas of the Murfreesboro Fire Department returned to her trailer and took her to jail. Ms. Howard again lied, claiming that she knew nothing about the fire. In a third interview with Inspector Peas, Ms. Howard gave a statement consistent with her testimony at trial.

Kelly Rose testified that she was at Ms. Stacey's apartment on August 12, 2002. During the day, Ms. Stacey got several threatening phone calls from women. The women threatened to beat Ms. Stacey up. Later that day, a group of people arrived at Ms. Stacey's apartment and threatened her. One of the people even threatened to burn down the house. Ms. Rose recognized some of the people, including the appellant, Jimmy McCrary, Shannon Hines, Christa Tellas, Jason Walz and Andy Anderson. Ms. Rose heard the appellant say that "he was going to have us beat up and he was going to beat us up, that he was going to burn Malinda's [Ms. Stacey's] house down."

Angel Whitaker Smith[1] testified that she did not know Ms. Stacey personally. On August 12, 2002, Ms. Whitaker was at Ms. Howard's trailer. During the day, she and Mr. Walz made a series of phone calls to Ms. Stacey about the appellant's dog. During the phone calls, there was cussing and yelling about the appellant's dog. Ms. Whitaker claimed that she was romantically involved with Mr. Walz at the time, but had knowledge that Ms. Stacey and Mr. Walz had dated in the past. Ms. Whitaker testified that she and Mr. Walz went to Ms. Stacey's apartment to retrieve the dog. When they picked up the dog, it had been shaved and written on with a marker. Ms. Whitaker thought that the appellant "was going to go crazy" when he saw the dog. The two took the dog back to Ms. Howard's trailer and made contact with the appellant. The appellant came to Ms. Howard's apartment with several other people.

According to Ms. Whitaker, the appellant was "very angry" when he saw his dog and wanted to confront Ms. Stacey about shaving the dog. The entire group caravanned to Ms. Stacey's apartment in two separate cars. The men rode in one car and the women rode in another. When they arrived, Ms. Whitaker described the scene as "chaos" with everyone "running every kind of way." Ms. Whitaker never saw Ms. Stacey, but saw the appellant and one other man go into the apartment. When the two men came out of the apartment, Ms. Whitaker heard them bragging that they "had flipped over her furniture and her refrigerator." At that time, Ms. Whitaker stated that the group left the apartment and returned to Ms. Howard's trailer.

Ms. Whitaker described the appellant and Mr. Walz as "very irate." She claims the appellant got on the telephone where she heard him talking "about his dog and that he wasn't going to let that go on, that s... happen." Then the group left the trailer again, went to a gas station and got gas. The group was in two separate vehicles. Ms. Whitaker's group left the gas station after the appellant's group. They decided to "go be nosey" and see if the appellant returned to Ms. Stacey's apartment to "settle the score about the dog." When they arrived at Ms. Stacey's apartment, they saw smoke coming from the back yard of the residence and heard sirens. Ms. Whitaker testified that they drove by the scene and returned to Ms. Howard's trailer.

Ms. Whitaker stated that the appellant and the other men were already at the trailer when they returned after seeing the fire. According to Ms. Whitaker, it "was a madhouse." The appellant ran to the door and shut it, announcing that "nobody was leaving, that we just better shut up and sit down, that if we think what he did to them was bad, wait, if we open our mouth, what he'll do to us." Ms. Whitaker felt threatened by the appellant. She heard the appellant say that "fire bombs got threw [sic] into the house, that he threw one and Eric Taylor threw one."

The next day, the appellant called Ms. Hedgepath and Ms. Whitaker on the phone to ask them what was going on and whether the police knew anything about the fire. Ms. Whitaker reiterated that the appellant told them to keep their mouths shut and threatened them by saying that he or someone he knew would hurt them very badly if they talked to the police.

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[1] For purposes of consistency, Angel Whitaker Smith will be referred to herein as Ms. Whitaker.

That night, Ms. Whitaker was taken to the police station for an interview. She admits that she lied to the police because she was afraid of the appellant and Mr. Walz. She even obtained a copy of her statement so that she could give it to the appellant to prove that she had not "snitch[ed] on him." The appellant told her that the statement was "good" and that she should "stick to what's on the paper."

Ms. Whitaker later contacted the police and asked to give a second interview. She decided to come forward with the truth at that time because the appellant was incarcerated and could no longer hurt her or her children.

Laura Hedgepath also testified at trial. She claimed that on the day of the fire, she got off work at 3:30 in the afternoon. She received a telephone call from Ms. Whitaker about the appellant's dog. When she got home from work, Ms. Whitaker, Mr. Walz and Amy Robinson picked her up. The group then went to Ms. Howard's trailer to look at the dog. The dog was shaved and had writing on it in marker. Ms. Hedgepath thought that the appellant was "going to be upset" when he saw the dog. Ms. Hedgepath got in touch with the appellant sometime later and told him about the dog. The appellant and other people then came to Ms. Howard's trailer and everyone decided to go to Ms. Stacey's apartment. Ms. Hedgepath testified that she thought there might be a fight. The girls rode in Ms. Whitaker's Jeep and the men rode in the appellant's car.

When they arrived at the apartment, Ms. Hedgepath described that there was a lot of "commotion" and "screaming and yelling," but that it appeared to her that no one was home. Ms. Hedgepath saw the appellant and a few other guys go into the apartment. When they came out of the apartment, Ms. Hedgepath heard the appellant say that they "flipped over some furniture or destroyed some property in her home." Then the groups left the apartment. The appellant told the girls that they needed to go back to the trailer because some "serious s... was going to go down."

Ms. Hedgepath testified that the girls then went to a gas station where they saw the men leaving as they were arriving. After getting gas and beer, the girls left the gas station and went by Ms. Stacey's apartment to "see what's going on." Ms. Hedgepath stated that when they drove by, the apartment was on fire. They hurried back to Ms. Howard's trailer, where the appellant and the other men were waiting. According to Ms. Hedgepath, "everyone was freaked out." The appellant was "pacing around" and "talking about making bombs and throwing them at Malinda Stacey's house." The appellant threatened the group.

Later that night, Ms. Hedgepath was contacted by the fire department. She refused to give a statement even after she was arrested because she felt like "her life would be in jeopardy." Ms. Hedgepath told the appellant that the police were looking for him. Ms. Hedgepath eventually agreed to give a statement after she retained an attorney.

Eric Taylor testified that he suffered burns on August 12, 2002, when the appellant threw a "cocktail bomb" at Malinda Stacey's apartment. He did not remember what the confrontation between the two groups was about, but remembered going to the gas station with the appellant and

others. At the gas station, they purchased "forty cents' worth of gas in two bottles." The bottles also had rags stuffed in them. After leaving the gas station, they went to Malinda Stacey's apartment.

Mr. Taylor admitted that he kicked in the door leading to the foyer and the staircase. Then Mr. Taylor stated that he threw his cocktail bomb up the staircase, where it hit the upstairs door, ricocheted and rolled back down the stairs. As he leaned over to pick up the bottle and toss it through a window, the appellant threw his cocktail bomb, which shattered against the house and exploded on Mr. Taylor. The appellant and Mr. Taylor then ran back to the vehicle and drove to Ms. Howard's trailer. Mr. Taylor remembered a conversation that went on when they arrived at the trailer in which the appellant told the girls that "if they were to say anything . . . that they would be killed."

After Mr. Taylor was arrested, he initially denied his involvement in the fire. After he was convicted, he finally admitted that he threw the first cocktail bomb because he knew that nothing else could happen to him at that point.

Hope Dennis[2] testified that she was five or six months pregnant in August of 2002 and that she was living with Ms. Stacey. She was present for the majority of the events that took place on August 12, 2002. She witnessed the telephone conversations concerning the appellant's dog and was present when Mr. Walz and another girl picked up the dog at the apartment. Ms. Dennis testified that a group of people, including the appellant, later came to the apartment to argue. Ms. Dennis stated that she did not hear anything that the appellant said. Ms. Dennis also stated that a man that she did not know "threatened to burn the house down." The group was there for ten or fifteen minutes and then left.

Ms. Dennis stated that the group returned while she and Mr. Fetty were alone in the apartment. According to Ms. Dennis, the appellant and two others came into the apartment looking for Ms. Stacey and Ms. Wilkinson. The appellant and the other "pulled the TV out of the entertainment center and dropped it on the floor." The men left when they realized that Ms. Stacey and Ms. Wilkinson were not there. Ms. Dennis stated that she also left at that time, but returned about fifteen minutes later.

When Ms. Dennis returned to the apartment, she and Mr. Fetty were talking when they heard "a loud noise" or a "loud boom." She "opened the door, and the stairway was on fire." The fire was coming up the steps. Mr. Fetty managed to call 911 and Ms. Dennis jumped out of the second-story window in to the arms of a neighbor. Mr. Fetty followed her out the window and tried to put the fire out with a garden hose. Ms. Dennis did not see who started the fire.

Carl Dwayne Peas, a fire inspector with the Murfreesboro Fire Department, investigated the fire at Ms. Stacey's apartment. There was "significant fire damage" to the back of the apartment

[2]Ms. Dennis got married after the incident and is now Hope Phelps, but will be referred to herein as Ms. Dennis in order to maintain consistency.

building, where the door leading up to Ms. Stacey's apartment was located. Most of the damage was contained in the "foyer area" at the bottom of the stairs leading up to the apartment, but there was also smoke damage to the apartment itself. There was a strong odor of gasoline at the scene, so Inspector Peas took samples from the floor in the foyer and the carpet on the steps as well as glass and fire debris and sent the samples to the Tennessee Bureau of Investigation for analysis. He also found a sixteen-ounce Bud Ice beer bottle at the scene. Inspector Peas testified that there was nothing in the area such as an electrical appliance or electrical wiring that could have contributed to the ignition of the fire. Inspector Peas concluded that the fire originated in the foyer area and was caused by an ignitable liquid.

According to Inspector Peas, both of Ms. Stacey's neighbors were home at the time of the fire. Further, Inspector Peas testified that Hope Dennis and Paul Fetty were inside Ms. Stacey's apartment during the fire. As a result of the investigation, several possible suspects were discovered, including the appellant, Jason Walz, Jimmy McCrary, Laura Hedgepath, Angel Whitaker, Amanda Howard, Amy Robinson, Eric Taylor and Andy Anderson.

Randall Nelson, a forensic scientist with the Tennessee Bureau of Investigation Crime Lab analyzed the broken glass that was recovered from the fire. Mr. Nelson stated that he discovered the "presence of a gasoline range product" that "was in evaporated state." The testing of the floor sample and fire debris also revealed the presence of a gasoline range product in an evaporated state. The analysis of the sample from the steps failed to reveal the presence of an ignitable liquid.

Nora Smith, an inspector with the Murfreesboro Fire Department, testified that she assisted in the investigation of the fire. As part of her investigation, she obtained a videotape from a nearby gas station's surveillance camera on the night of the fire. The videotape shows Andy Anderson buying one dollar's worth of gas. Four minutes later, the tape shows Ms. Hedgepath and Amy Robinson buying two beers and two dollar's worth of gas. Ms. Hedgepath and the store clerk discussed the fact that Mr. Anderson had paid for a dollars' worth of gas buy had only pumped forty cents' worth, which confused the clerk.

At the conclusion of the jury trial, the jury found the appellant guilty of the lesser-included offense of attempted aggravated arson. At a sentencing hearing, the trial court sentenced the appellant to seventeen years as a Range II multiple offender. The appellant filed a motion for new trial and several amended motions for new trial. The motion for new trial was ultimately denied by the trial court and this appeal ensued. On appeal, the appellant presents the following issues for our review: (1) whether the evidence was sufficient to support the verdict; (2) whether the trial court improperly instructed the jury on accomplice testimony; and (3) whether the trial court denied the appellant the right to allocution at the sentencing hearing.

Analysis

Sufficiency of the Evidence

The appellant argues on appeal that the evidence is insufficient to support his conviction for attempted aggravated arson. Specifically, the appellant contends that the evidence was insufficient because the majority of the State's evidence came from witnesses who could be considered accomplices to the crime. The State argues that because there was sufficient corroborating evidence apart from the testimony of the accomplices, the evidence was sufficient to support the conviction.

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and "approved by the trial judge, accredits the testimony of the state's witnesses and resolves all conflicts in the testimony in favor of the state." State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994); State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally cloaked with a presumption of innocence, the jury verdict of guilty removes this presumption "and replaces it with one of guilt." State v. Tuggle, 639 S.W .2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence. Id. The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. See Tenn. R. App. P. 13(e); Harris, 839 S .W.2d at 75. In making this decision, we are to accord the state "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." See Tuggle, 639 S.W.2d at 914. As such, this Court is precluded from re-weighing or reconsidering the evidence when evaluating the convicting proof. State v. Morgan, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own "inferences for those drawn by the trier of fact from circumstantial evidence." Matthews, 805 S.W.2d at 779. Further, questions concerning the credibility of the witnesses and the weight and value to be given to evidence, as well as all factual issues raised by such evidence, are resolved by the trier of fact and not the appellate courts. State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990).

Moreover, the guilt of a defendant as well as any fact required to be proved may be established by direct evidence, by circumstantial evidence, or by a combination of both. See State v. Pendergrass, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). In fact, a criminal offense may be established exclusively by circumstantial evidence so long as the evidence excludes all other reasonable theories except that of the defendant's guilt. See State v. Crawford, 470 S.W.2d 610, 612 (Tenn. 1971). In addition, the weight of the circumstantial evidence is for the jury to determine, and this Court may not substitute the jury's inferences drawn from the circumstantial evidence with our own inferences. See Pruitt v. State, 460 S.W.2d 385, 391 (Tenn. Crim. App. 1970).

Because the appellant challenges the sufficiency of the evidence on the basis that the accomplice testimony was not corroborated, we begin our analysis by acknowledging the well-settled law of this state that convictions may not be based solely upon the uncorroborated testimony of

accomplices. See State v. Robinson, 971 S.W.2d 30, 42 (Tenn. Crim. App. 1997). However, Tennessee law requires only a modicum of evidence in order to sufficiently corroborate such testimony. See State v. Copeland, 677 S.W.2d 471, 475 (Tenn. Crim. App. 1984). More specifically, precedent provides that:

> The rule of corroboration as applied and used in this State is that there must be some evidence independent of the testimony of the accomplice. The corroborating evidence must connect, or tend to connect the defendant with the commission of the crime charged; and, furthermore, the tendency of the corroborative evidence to connect the defendant must be independent of any testimony of the accomplice. The corroborative evidence must[,] of its own force, independently of the accomplice's testimony, tend to connect the defendant with the commission of the crime.

State v. Griffis, 964 S.W.2d 577, 588-89 (Tenn. Crim. App. 1997) (quoting Sherrill v. State, 321 S.W.2d 811, 814 (Tenn. 1959)). In addition, our courts have stated that:

> The evidence corroborating the testimony of an accomplice may consist of direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. The quantum of evidence necessary to corroborate an accomplice's testimony is not required to be sufficient enough to support the accused's conviction' independent of the accomplice's testimony nor is it required to extend to every portion of the accomplice's testimony. To the contrary, only slight circumstances are required to corroborate an accomplice's testimony. The corroborating evidence is sufficient if it connects the accused with the crime in question.

Griffis, 964 S.W.2d at 589. Furthermore, we note that the question of whether an accomplice's testimony has been sufficiently corroborated is for the jury to determine. See id. at 588; State v. Maddox, 957 S.W.2d 547, 554 (Tenn. Crim. App. 1997).

Viewing the evidence in a light most favorable to the State, the proof at trial established that the appellant was one of the individuals that went to Ms. Stacey's apartment and threw one of the cocktail bombs, setting fire to the building. Several of the witnesses, including Ms. Howard, Ms. Whitaker and Ms. Hedgepath testified that they heard the appellant admit his involvement in the fire when the group gathered at Ms. Howard's trailer after the fire was started. Further, Mr. Taylor testified that he and the appellant were the individuals that threw the gasoline-filled beer bottles.

While there was testimony implicating the appellant in the arson from individuals who could have been considered by the jury to be accomplices, there was also testimony implicating the appellant from individuals such as Ms. Howard, Ms. Whitaker, and Ms. Hedgepath, who while friends of the appellant, knew nothing about the fire until after the fact. The jury would be well within its province in declining to consider these persons accomplices. Moreover there was testimony from individuals that no one could consider an accomplice. Kelly Rose, who lived with Ms. Stacey, testified that she heard the appellant say "[t]hat he was going to have us beat up and he

was going to beat us up, that he was going to burn Malinda's [Ms. Stacey's] house down. Further, both fire inspectors testified that they found broken glass at the scene of the fire that tested positive for the presence of a gasoline product, which is consistent with the State's theory and the testimony of the other witnesses that the appellant and Mr. Taylor threw gasoline-filled beer bottles at Ms. Stacey's apartment building. Finally, there was independent evidence from the surveillance tape at the gas station that one of the people that the appellant had been traveling with purchased forty cents' worth of gasoline shortly before the fire was started at Ms. Stacey's apartment.

Again, the jury is the primary instrument of justice responsible for determining the weight and credibility to be given to the testimony of the witnesses. Pruett, 788 S.W.2d at 561. Conflicts in that testimony are matters that are entrusted exclusively to the trier of fact and not this Court. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984). Looking at the verdict, it is clear that the jury found sufficient corroboration of the accomplice testimony. Recognizing that only a modicum of evidence is necessary to corroborate an accomplice's testimony, we find that the foregoing direct and circumstantial evidence was more than adequate to convict the appellant of attempted aggravated arson.

Jury Instructions

Next, the appellant complains that the trial court improperly instructed the jury regarding accomplice testimony. Specifically, the appellant contends that the trial court should have instructed the jury as to which witnesses were accomplices. The State argues that the appellant waived this issue for failure to include it in a motion for new trial. Moreover, nothing in the record indicates that the appellant requested that the trial court instruct the jury as to which of the witnesses were accomplices. "[A]lleged omissions in the charge must be called to the trial judge's attention at trial or be regarded as waived." State v. Haynes, 720 S.W.2d 76, 85 (Tenn. Crim. App. 1986); see Tenn. R. Crim. P. 30(b). In the alternative, the State argues that the trial court properly instructed the jury on accomplice testimony.

We recognize that a defendant has a constitutional right to trial by jury. U.S. Const. amend. VI; Tenn. Const. Art. I, § 6. In Tennessee, the right to trial by jury is the right guaranteed to every litigant in jury cases to have the facts involved tried and determined by twelve jurors. State v. Bobo, 814 S.W.2d 353, 356 (Tenn. 1991) (citing Willard v. State, 130 S.W.2d 99 (Tenn. 1939)). It follows that the defendant has a right to have "every issue of fact raised by the evidence and material to his defense submitted to the jury upon proper instructions by the judge." State v. Brown, 836 S.W.2d 530, 553 (Tenn. 1992) (citations omitted).

However, the appellant did not raise the jury instruction issue in a motion for new trial. While the appellant acknowledges that this issue was not properly addressed in a motion for new trial, he argues on appeal that the trial court's failure to properly instruct the jury rises to the level of plain error because it affected "his rights to a fair trial."

This Court may, in an exercise of its discretion, consider an issue which has been waived. However, in order for this Court to find plain error, the error must affect a substantial right of the accused. Tenn. R. Crim. P. 52(b). Generally, the failure to present an issue in a motion for new trial results in waiver of the issue on appeal. Rule 3(e) of the Tennessee Rules of Appellate Procedure provides that for appeals "in all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, . . . or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived." See also State v. Martin, 940 S.W.2d 567, 569 (Tenn. 1997) (holding that a defendant relinquishes the right to argue on appeal any issues that should have been presented in a motion for new trial).

Whether properly assigned or not, however, this court may consider plain error upon the record under Rule 52(b) of the Tennessee Rules of Criminal Procedure. State v. Ogle, 666 S.W.2d 58 (Tenn. 1984). In order to review an issue under the plain error doctrine, five factors must be present: (1) the record must clearly establish what occurred in the trial court; (2) a clear and unequivocal rule of law must have been breached; (3) a substantial right of the defendant must have been adversely affected; (4) the accused did not waive the issue for tactical reasons; and (5) consideration of the error is necessary to do substantial justice. See State v. Adkisson, 899 S.W.2d 626, 641 (Tenn. Crim. App. 1994); see also Tenn. R. Crim. P. 52(b). An error in jury instructions on the conduct element of an offense will be plain when it cannot be classified as harmless beyond a reasonable doubt.

Rule 52(b) of the Tennessee Rules of Criminal Procedure makes it clear that the plain error rule is not a remedy to be used in many situations. The intention of the rule is to serve the ends of justice. Therefore, it is invoked "only in exceptional circumstances [where necessary] to avoid a miscarriage of justice." Adkisson, 899 S.W.2d at 639 (quoting United States v. Gerald, 624 F.2d 1291, 1299 (5th Cir. 1980)). Appellate courts are advised to use it sparingly in recognizing errors that have not been raised by the parties or have been waived due to a procedural default. Id.

"Because the Adkisson test provides a clear and meaningful standard for considering whether a trial error rises to the level of plain error in the absence of an objection," the Tennessee Supreme Court formally adopted this test when reviewing a record for plain error. State v. Smith, 24 S.W.3d 274, 282-83 (Tenn. 2000). In doing so, it re-emphasized that the presence of all five factors must be established by the record before the existence of plain error can be recognized and that complete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established. Id. The " 'plain error' must [have been] of such a great magnitude that it probably changed the outcome of the trial." Id. (citing Adkisson, 899 S.W.2d at 642).

In the case herein, the trial court instructed the jury on accomplice testimony, but did not instruct the jury as to which witnesses were accomplices. On appeal, the appellant has not demonstrated that he did not waive the issue for tactical reasons or that consideration of the error is necessary to do substantial justice. Furthermore, the appellant has not shown that a clear and unequivocal rule of law was breached by the trial court in not instructing the jury as to which

witnesses should be considered accomplices. When there are undisputed facts regarding a witnesses's participation in a crime, the question of whether he is an accomplice is a question of law for the trial court. See State v. Perkinson, 867 S.W.2d 1, 7 (Tenn. Crim. App. 1992). However, when the facts are in dispute or are susceptible to different inferences, as is the case herein, the determination of whether a witness is an accomplice is a question for the jury. See Conner v. State, 531 S.W.2d 119, 123 (Tenn. Crim. App. 1975). The appellant has failed to establish that all five of the Adkisson factors are present herein. Consequently, we decline to find plain error on the part of the trial court.

Allocution at Sentencing Hearing

Finally, the appellant argues that the trial court erred by denying him the right to make a statement at the sentencing hearing. Specifically, the appellant argues that he "was not informed of his right, nor [sic] was he given the opportunity to [speak]." The State counters that the appellant waived the issue for failure to include it in a motion for new trial and that the appellant's attempt to orally amend the motion for new trial by raising the issue at the new trial hearing was insufficient to preserve the issue for appellate review.

As stated previously, Tennessee Rule of Appellate Procedure 3(e) requires issues to be raised in a motion for new trial as a predicate for appellate review. As noted by the State, this issue is absent from the appellant's motion for new trial and numerous amendments thereto. The appellant did attempt to orally amend his motion for new trial at the hearing, but failed to reduce the amendment to writing within thirty days of the entry of the order pronouncing his sentence as required by Tennessee Rule of Criminal Procedure 33(b). Thus, we determine that the appellant has waived the issue.

Moreover, this issue has no merit. Allocution has been defined "as the formality of the court's inquiry of a convicted defendant as to whether he has any legal cause to show why judgment should not be pronounced against him on the verdict of conviction." State v. Stephenson, 878 S.W.2d 530, 551 (Tenn. 1994) (citing Black's Law Dictionary 76 (6th ed. 1990)) (footnote omitted). It is "an unsworn statement from a convicted defendant to the sentencing judge or jury in which the defendant can ask for mercy, explain his or her conduct, apologize for the crime, or say anything else in an effort to lessen the impending sentence. This statement is not subject to cross-examination." Black's Law Dictionary 75 (7th ed. 1999); see also United States v. Gilbert, 244 F.3d 888, 924 (11th Cir. 2001). Tennessee Code Annotated Section 40-35-210(b)(7) mandates that, in a non-capital case, a defendant be allowed allocution before a sentencing judge or jury. This section provides, "To determine the specific sentence and the appropriate combination of sentencing alternatives that shall be imposed on the defendant, the court shall consider . . . [a]ny statement the defendant wishes to make in the defendant's own behalf about sentencing." Tenn. Code Ann. § 40-35-210(b)(7). "The trial judge, in determining the appropriate sentence . . . shall consider, among several factors, any statement the defendant wishes to make in his own behalf about sentencing . . . ." Stephenson, 878 S.W.2d at 551.

In State v. Keathly, 145 S.W.3d 123, 125 (Tenn. Crim. App. 2003), this Court reversed a defendant's sentence where the trial court refused to allow the defendant to read a statement without being placed under oath and subject to cross-examination. In the case herein, unlike Keathley, the trial court did not refuse to allow the appellant to make a statement. At the sentencing hearing, defense counsel informed the trial court, "Judge, this is a statement as much as anything. [The appellant] wants you to know that he has successfully completed the Bible correspondence course at the Rutherford County Adult Detention Center. And he also has a certificate of achievement from the Jail & Prison Ministry." The certificates were then made an exhibit to the hearing. Defense counsel later tried, albeit unsuccessfully, to introduce the criminal histories of two of the appellant's accomplices. After the trial court refused to allow defense counsel to introduce that evidence, defense counsel commented, "[T]hat's the extent of the proof that we wish to put on." The trial court did not prohibit the appellant from addressing the court at that time. At the hearing on the motion for new trial, the trial court admitted that it did not specifically remember asking the appellant if he wished to make a statement at the sentencing hearing, but that he specifically remembered that he did not deny the appellant the opportunity to do so. The appellant had the opportunity to make a statement and failed to do so.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

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JERRY L. SMITH, JUDGE